

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Community Affairs Committee

BILL: CS/SB 270

INTRODUCER: Community Affairs Committee and Senator Dockery

SUBJECT: Public Records/Insured Dependents/Agency Group Plan

DATE: March 3, 2009

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Molloy	Yeatman	CA	Fav/CS
2.			GO	
3.			RC	
4.				
5.				
6.				

Please see Section VIII. for Additional Information:

- | | | |
|------------------------------|--|---|
| A. COMMITTEE SUBSTITUTE..... | <input checked="checked" type="checkbox"/> | Statement of Substantial Changes |
| B. AMENDMENTS..... | <input type="checkbox"/> | Technical amendments were recommended |
| | <input type="checkbox"/> | Amendments were recommended |
| | <input type="checkbox"/> | Significant amendments were recommended |

I. Summary:

The CS/SB 270 creates a public records exemption for personal information that identifies a dependent child of a current or former officer or employee of an agency if the minor dependent is insured under an agency group insurance plan. The CS provides that personal information identifying such dependent child is exempt from the public records requirements of s. 119.07(1)(a), F.S., and section 24(a), Article I of the State Constitution.

The CS provides that the exemption is remedial in nature and applies to personal identifying information held by an agency before, on, or after the effective date of the exemption. The exemption is subject to legislative review and repeal under the provisions of the Open Government Sunset Review Act.

The CS substantially amends subsection (4) of s. 119.071, F.S., and creates one undesignated section of law.

II. Present Situation:

Public Access - Florida has a long history of providing public access to the records of governmental and other public entities. The Legislature enacted its first law affording access to public records in 1892. In 1992, Florida voters approved an amendment to the State Constitution which raised the statutory right of access to public records to a constitutional level.

Paragraph (a) and (c) of Section 24, Art. I of the State Constitution provide the following:

(a) Every person has the right to inspect or copy any public records made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf, except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution. This section specifically includes the legislative, executive, and judicial branches of government and each agency or department created thereunder; counties, municipalities, and districts; and each constitutional officer, board, and commission, or entity created pursuant to law or this Constitution.

(c) This section shall be self-executing. The legislature, however, may provide by general law passed by a two-thirds votes of each house for the exemption of records from the requirements of subsection (a) and the exemption of meetings from the requirements of subsection (b); provided that such law shall state with specificity the public necessity justifying the exemption and shall be no broader the necessary to accomplish the state purpose of the law. . . . Laws enacted pursuant to this subsection shall contain only exemptions from the requirements of subsections (a) and (b) and provisions governing the enforcement of this section, and shall relate to one subject.

Florida's Public Records Law – Florida's public records law is contained in chapter 119, F.S., and specifies conditions under which the public must be given access to governmental records. Section 119.07(1)(a), F.S., provides that every person who has custody of a public record¹ must permit the record to be inspected and examined by any person, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public record. Unless specifically exempted, all agency² records are to be available for public inspection.

Section 119.011(12), F.S., defines the term "public record" to include all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency. The Florida Supreme Court has interpreted this definition to encompass all

¹ s. 119.011(1), F.S., defines "public record" to include "all documents, papers, letters, maps, books, tapes, photographs, film, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency."

² s. 119.011(2), F.S., defines "agency" as "...any state, county, district, authority, or municipal officer, department, division, authority, or municipal officer, department, division, board, bureau, commission, or other separate unit of government created or established by law including, for the purposes of this chapter, the Commission on Ethics, the Public Service Commission, and the Office of Public Counsel, and any other public or private agency, person, partnership, corporation, or business entity acting on behalf of any public agency."

materials made or received by an agency in connection with official business which are “intended to perpetuate, communicate, or formalize knowledge.”³ All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.⁴

Only the Legislature is authorized to create exemptions to open government requirements.⁵ Exemptions must be created by general law and such law must specifically state the public necessity justifying the exemption. Further, the exemption must be no broader than necessary to accomplish the stated purpose of the law.⁶ A bill enacting an exemption⁷ may not contain other substantive provisions although it may contain multiple exemptions relating to one subject.⁸

There is a difference between records that the Legislature exempts from public inspection and those that the Legislature makes confidential and exempt from public inspection. If a record is made confidential with no provision for its release so that its confidential status will be maintained, such record may not be released by an agency to anyone other than the person or entities designated in the statute.⁹ If a record is simply exempt from mandatory disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances.¹⁰

Open Government Sunset Review Act - The Open Government Sunset Review Act established in s. 119.15, F.S., provides a review and repeal process for public records exemptions. In the fifth year after enactment of a new exemption or in the fifth year after substantial amendment of an existing exemption, the exemption is repealed on October 2, unless reenacted by the Legislature. Each year, by June 1, the Division of Statutory Revision of the Joint Legislative Management Committee is required to certify to the President of the Senate and the Speaker of the House of Representatives the language and statutory citation of each exemption scheduled for repeal the following year.

Remedial application of exemption – In March 2001, the Florida Legislature enacted s. 406.135, F.S., to create a public records exemption for photographs, videos, or audio recordings of an autopsy, and to provide that the exemption be applied retroactively. The exemption was created in response to public records requests made for the autopsy photographs relating to the death of race car driver Dale Earnhardt who was involved in a fatal crash during the 2001 Daytona 500 race. In *Campus Communications, Inc. v Teresa Earnhardt, and the Estate of Dale Earnhardt*, 821 So. 2d 388, the District Court of Appeals, Fifth District, rejected the Campus claim that the retroactive application of the exemption abrogated or impaired its vested right to view the autopsy photographs by noting the following:

When considering whether a statute should be retroactively applied, the courts should determine 1) whether there is clear evidence that the Legislature intended to apply the

³ *Shevin v. Byron, Harless, Shafer, Reid, and Assocs., Inc.*, 379 So. 2d 633, 640 (Fla. 1980).

⁴ *Wait v. Florida Power & Light Company*, 372 So.2d 420 (Fla. 1979)

⁵ Article I, s. 24(c) of the State Constitution.

⁶ *Memorial Hospital-West Volusia v. News-Journal Corporation*, 729 So.2d 373, 380 (Fla. 1999); *Halifax Hospital Medical Center v. News-Journal Corporation*, 724 So.2d 567 (Fla. 1999).

⁷ s. 119.15, F.S., provides that an existing exemption may be considered a new exemption if the exemption is expanded to cover additional records.

⁸ Article 1, s. 24(c) of the State Constitution

⁹ Attorney General Opinion 85-62, August 1, 1985.

¹⁰ *Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5th DCA), review denied, 589 So.2d. 289 (Fla.1991).

statute retrospectively; and 2) whether retrospective application is constitutionally permitted. *Metropolitan Dade County v Chase Fed. Hous. Corp.*, 737 So.2d. 494 (Fla. 1999). The second inquiry is generally premised on a finding by the court that the Legislature has clearly expressed an intent that the statute apply retroactively....*See also City of Orlando v. Desjardins*, 493 So.2d 1027, 1028 (Fla.1986) (“If a statute is found to be remedial in nature, it can and should be retroactively applied in order to serve its intended purpose.”) and

We disagree that this is a vested right for two reasons: 1) the right to inspect and copy public records is a right subject to divestment by enactment of statutory exemptions by the Legislature; and 2) the rights provided under the Public Records Act are public rights.

While the Public Records Act grants to Florida citizens the right to inspect and copy public records, “the legislature also has the prerogative to place reasonable restrictions on that right.” *Henderson*, 745 So.2d at 326....Both the Florida Constitution and the Public Records Act declare that the right to inspect and copy public records is a right subject to divestment by legislative enactment.

Joel Chandler v. The School Board of Polk County and Gail F. McKinzie, Superintendent of Schools, in her official capacity as custodian of records¹¹

In February 2008, Joel Chandler submitted a written request to the Polk County School Board for public record information relating to the school board’s health insurance policy. Mr. Chandler requested the name, address, gender, age, title, and telephone number of all school board employees and their dependents covered under the policy.¹² The School Board responded by providing some information and claimed that additional information was “confidential and exempt” under chapter 119, Florida Statutes. Mr. Chandler retained counsel, an additional letter requesting the information was submitted, and no response was received. Mr. Chandler filed a civil suit in May 2008.

The Court ruled that “there is no legal basis for withholding the information sought by the plaintiff, except as further set forth in this order, and to that extent, the defendant’s conduct is contrary to law. This Court cannot “legislate” an exemption where none exists.” The Court further noted “the plaintiff is not seeking personally identifiable health information as that term is used in the Health Insurance Portability and Accountability Act of 1996,¹³ and in any event, the defendant is not a “covered entity” under the Act.”

¹¹ Case No. 2008CA-004389, 10th Judicial Circuit in and for Polk County, Florida, Civil Division Section 11

¹² According to the Polk County School Board, as of December 2008, the plan covered 17,475 active employees, 672 retirees (non-Medicare) and 1,962 retirees (Medicare).

¹³ The Health Insurance Portability and Accountability Act (HIPAA) is located in 45 CFR, Part 160. HIPAA provides that a “health plan” is an individual or group plan that provides or pays the cost of medical care. A “group plan” is one that has 50 or more participants or is administered by an entity other than the employer that established and maintains the plan. Also, “individually identifiable health information”, a subset of “health information”, which is protected by HIPAA includes demographic information that identifies or can reasonably be believed to identify the individual. “Health information” is defined as (1) any information, whether oral or recorded in any form or medium, that is created or received by a health care provider, health plan, public health authority, employer, life insurer, school or university, or health care clearinghouse; and (2) relates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual.

The Polk County School Board was given two weeks to comply with Mr. Chandler's public records request and was ordered to pay the plaintiff's costs and reasonable attorneys fees. Mr. Chandler has submitted similar requests to the remaining 66 school districts in the state and has filed lawsuits against Lee, Manatee, Marion, Orange, St. Lucie, St. Johns, Flagler and Clay counties.¹⁴

Florida Attorney General – Advisory Legal Opinion (Informal¹⁵)

In November 2008, the Office of the Florida Attorney General issued an informal Advisory Legal Opinion to the bill sponsor to address whether sections of Florida Statutes¹⁶ preclude the release of information that identifies school district employees, their dependents, and their health insurance plans. The Office declined to comment on the application of HIPPA¹⁷ but did note that while information relating to an insurance program participant's medical condition is protected, "there is no clear statement that such protection extends to the name, address, age, or other non-medical information of such participants. When doubt exists as to whether a particular document is exempt from disclosure under Florida's Public Records Law, the exemption is to be narrowly construed and any doubt resolved in favor of public access."

III. Effect of Proposed Changes:

Section 1. amends s. 119.071(4)(b), F.S., to create a new public records exemption for personal identifying information of a dependent child of a current or former officer or employee of an agency¹⁸, which dependent child is insured by an agency group health insurance plan. For purposes of the exemption, "dependent child" has the same meaning as in s. 409.2554, F.S.¹⁹

The exemption is remedial in nature and applies to identifying information held before, on, or after the effective date of the exemption. The exemption is subject to review under the provisions of the Open Government Sunset Review Act and is repealed on October 2, 2014, unless reviewed and reenacted by the Legislature.

Section 2 provides a statement of public necessity:

¹⁴ The *Lakeland Ledger* reported on January 7, 2009, that the Polk County School Board agreed to pay \$25,000 in attorney's fees after the Circuit Court ruled that Mr. Chandler could have access to identifying information on approximately 13,000 school board employees, and identified the counties against which lawsuits have been filed.

¹⁵ Formal numbered opinions are issued by the Attorney General to address laws of statewide concern. Informal opinions address questions of more limited application. (see <http://myfloridalegal.com/>).

¹⁶ s. 112.08(7), F.S., relating to exemptions for county and municipal employees enrolled in a county or municipal health insurance plan or self-insurance plan, and s. 119.071(4)(b), F.S., relating to medical information pertaining to current, former or prospective agency employees.

¹⁷ The Office of the Attorney General noted that "this office does not generally interpret federal law."

¹⁸ s. 119.011(2), F.S., defines "agency" as "any state, county, district, authority, or municipal officer, department, division, board, bureau, commission, or other separate unit of government created or established by law, including, for the purposes of this chapter, the Commission on Ethics, the Public Service Commission, and the Office of Public Counsel, and any other public or private agency, person, partnership, corporation, or business entity acted on behalf of any public agency."

¹⁹ Section 409.2554(2), F.S., defines "dependent child" as any unemancipated person under the age of 18, any person under the age of 21 and still in school, or any person who is mentally or physically incapacitated when such incapacity began prior to such person reaching the age of 18.

- Personal identifying information of an agency employee is and should remain available to the public because such employee works for the public.
- The existence of the World Wide Web and the proliferation of personal computers throughout the world encourages and promotes the wide dissemination of information 24 hours a day and such widespread unauthorized dissemination of personal identifying information could subject the child to harm.
- Personal identifying information of an insured minor dependent of such employee held by an agency is sensitive, personal information that could be obtained by a requestor and used to identify a minor for sexual or other criminal offenses.
- Exempting such identifying information helps to protect the minor while still allowing the public oversight of group insurance plans by allowing the release of information that does not specifically identify the minor.

Section 3 provides that if enacted into law, the bill will take effect July 1, 2009.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

The CS creates a public records exemption that will limit public access to certain personal identifying information relating to minor children. The CS meets the requirements of s. 24, Art. I, State Constitution, by containing a statement of public necessity to justify the exemption, by relating to only subject, and by containing only one exemption. The CS requires a two-thirds vote of each house of the Legislature for enactment.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

Agencies who incur expenses in reproducing public records containing the identifying information which will be exempt under the provisions of the bill may see some reductions in expenditures.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Community Affairs Committee on March 3, 2009

The CS changes “minor dependent” to “dependent child” and provides a definition for “dependent child,” and provides that the exemption applies to identifying information of dependent children enrolled in an agency group insurance plan so that all agency group insurance plans are covered under the exemption. The CS further clarifies the statement of public necessity by noting that access to information disseminated on the World Wide Web could subject a child to harm.

B. Amendments:

None.